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No.

In the

Supreme Court of the United States

October Term, 1998

ROBERT VALDESPINO; BRENDA ROLON,

Petitioners,

v

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a case under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, are Hispanic Plaintiffs limited to producing **only** a single-member district containing a majority of Hispanic voting age citizens, to the exclusion of all other evidence, to show the "geographic insularity" requirement of *Thornburg v. Gingles?*

2. Under Section 2 of the Voting Rights Act, must a Defendant show more than that changes have occurred since the decennial census before being allowed to supplant that population data with invalid population information in order to defeat a plaintiff's voting rights claim?

LIST OF PARTIES TO THE PROCEEDING

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The opinion of the Court of Appeals is reported at 168 F.3rd 848 (5th Cir. 1999), and is included in the Appendix hereto at App. 1a. The opinion and judgment of the district court were issued on February 3, 1998 and are reprinted at App. 19a.

JURISDICTION

The Court of Appeals entered its judgment on March 11, 1999. This petition for writ of certiorari is filed within 90 days of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is reprinted at App. 34a.

STATEMENT OF THE CASE

Petitioners (Plaintiffs below) are Hispanic residents, citizens, and voters of the Alamo Heights Independent School District, ("Alamo Heights I.S.D."). Petitioners contend that the at-large election system used to elect trustees to the Alamo Heights I.S.D. dilutes Hispanic voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Respondent, the Alamo Heights I.S.D., is a school district organized under the laws of the State of Texas.

Alamo Heights I.S.D. has a population of about 25,000 persons according to the 1990 census. (P-24). Hispanics make up over 18% of the population, 17% of the voting age

population and about 24% of the student body. (P. 11 & 24). According to the 1990 census, the Alamo Heights I.S.D. lost population between 1980 and 1990. (P. 37). However, between 1980 and 1990 the Hispanic population of the Alamo Heights I.S.D. increased by over 28%. *Id.* According to the 1990 census, eighty-nine percent of the voting-age Hispanics are citizens eligible to vote. (App. 24a).

The Alamo Heights I.S.D. is governed by a seven member board of trustees. (R. Vol. 2, p. 341). All of the trustees are elected in a nonpartisan at-large, by place, majority vote election system to staggered three year terms. (R. Vol. 4, pp. 185-186). There is no subdistrict residency requirement nor is single shot voting allowed. *Id.* The Alamo Heights I.S.D. uses only one polling place for elections. (R. Vol. 4, p. 187).

A. *The Decision of the District Court.* Trial in this cause was held from September 15 through September 19, 1997. (App. 19a-20a). On February 3, 1998, the district court entered an order and judgment in favor of defendants. (App. 19a). In applying *Thornburg v. Gingles,* 478 U. S. 30, 50-1 (1986), the district court set aside 1990 census data and relied upon Respondents' estimates of population. Then, the Court found that Petitioners failed to establish the first element of the *Gingles* threshold factors. (App. 28a). The district court's determination was premised on its holding that Petitioners did not show that it is possible to draw a district in the Alamo Heights I.S.D. with a majority of Hispanic **citizen** voting age population when census data was adjusted for demographic changes since the 1990 census. (App. 28a)

The districting plans submitted by Petitioners contained a district with majority Hispanic population, majority Hispanic voting age population, and **majority Hispanic citizen voting age population according to the 1990 census**. (App. 24a).

The undisputed record also showed that single member districts in adjoining jurisdictions with smaller Hispanic concentrations had elected Hispanic representatives. (R. Vol. 7, pp. 639-640). Relying, not on the presumptively accurate 1990 census, but rather on the admittedly wrong population projections submitted by the Alamo Heights I.S.D., the district court held that Petitioners' evidence did not, as a matter of law, satisfy the first prong of *Gingles*. In so doing, the district court applied a "bright-line" test based on the proposition that only by establishing that the putative district contained a majority of Hispanic citizen voting age population, according to Respondents' 1997 estimate of population, could Petitioners meet the *Gingles* threshold requirement. (App. 27a-28a).

B. *The Opinion of the Court of Appeals.* The Court of Appeals affirmed, holding that: "Given that the Supreme Court has avoided the issue of what population to use for the first *Gingles* factor, and that other circuits have used the same approach as *Campos*, the district court used the correct legal test." (App. 10a). In rejecting Petitioners' argument that a more flexible standard of requiring a showing that Hispanics would comprise a sufficient majority in a proposed district to have the potential to elect candidates of their choice, the Court of Appeals determined that, "All of these complaints are baseless. In reality, this court has interpreted the *Gingles* factors as a bright line test." (App. 8a). Finally, the Court of Appeals determined that the abandonment of the decennial census, for admittedly erroneous population projections, was not clear error. (App. 12a).

REASONS FOR GRANTING THE WRIT

This case presents substantial questions involving the application of Section 2 of the Voting Rights Act and the meaning of the first *Gingles* threshold element. First, the rules

applied by the Fifth Circuit on this issue are new. Neither the Fifth Circuit, nor most of the other Courts of Appeals have previously applied such a rigid standard to the first *Gingles* precondition. The new rule of the Fifth Circuit forecloses any Section 2 cause of action, even when politically cohesive Hispanic citizens can establish that a challenged election system dilutes their voting strength and further when a feasible electoral alternative to the challenged structure is possible. Second, the new rule of the Fifth Circuit conflicts with the decisions of this Court and those of other Circuit Courts. Third, the new rule of the Fifth Circuit is also inconsistent with the intent of Congress in its enactment of the amendments to Section 2 of the Voting Rights Act in 1982. Fourth, allowing substitution of admittedly wrong and inconsistent population projections for the decennial census is contrary to standards set by this Court.

I. The New Rule Established by the Decision Below for Evaluating Plaintiffs' Evidence on the *Gingles I* Threshold Factor Forecloses Section 2 Challenges in an Important Class of Cases.

The Court of Appeals, addressing the first *Gingles* issue (Is the minority group large and compact enough to form a single member district?), ruled that this test could only be met by producing a district in which Hispanics comprise a majority of the citizen voting age population of the district. (App. 9a-10a). The Court of Appeals held that, "Given that the Supreme Court has avoided the issue of what population to use for the first *Gingles* factor, and that other circuits have used the same approach as *Campos*, the district court used the correct legal test." (App. 10a).

Until recently[1], the Fifth Circuit followed a standard that focused on whether Section 2 plaintiffs could establish that they possessed the ability to elect candidates of their choice absent the challenged structure. *Campos v. City of Baytown, Texas* 840 F.2d 1240, 1244 (5th Cir. 1988) (reviewed total population to determine whether plaintiffs possessed the potential to elect candidates of choice); *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989) ("The appellants had the burden to prove the existence of a single-member district in which they could elect candidates of their choice."); *Westwego Citizens v. City of Westwego*, 946 F.2d 1109, 1117 n. 10 (5th Cir. 1991) ("As we held in *Westwego, II*, it is entirely proper to refer to evidence other than census data to establish the 'potential to elect'"); *Campos v. City of Houston*, 113 F.2d 544, 548 (5th Cir. 1997) (citizen voting age population is important to determine whether minority group possess the potential to elect candidates of their choice).

The Court of Appeals in this case adopted a "bright-line" test that may **only** be met by showing that Hispanics exceed 50% of the citizen voting age population of the demonstration district submitted by plaintiffs to satisfy their burden under *Gingles I.* (App. 9a-10a). Thus, as occurred here, Hispanic plaintiffs who establish in a Section 2 case that, in the totality of circumstances, a challenged election structure

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[1]Just prior to its decision here, the Fifth Circuit, for the first time, made clear its intent to adopt a "bright line" test in evaluating the first prong of *Gingles* even to the exclusion of election data demonstrating the electoral feasibility of the putative district: ". . . evidence that the group may succeed in electing preferred candidates [from the putative district] cannot remedy its failure to meet the *Gingles* threshold." *Perez v. Pasadena Independent School District*, 165 F.3rd 368, 373 (5th Cir. 1999).

dilutes their ability to vote and that a district can be drawn in which the minority group will have the ability to elect candidates of its choice, will nevertheless be foreclosed from pursuing their claims. This is particularly troubling as the next decennial census approaches.

It is now well settled that the *Gingles* threshold factors apply to Section 2 challenges to single-member redistricting plans as well as to challenges to multi-member and at-large election systems. *Growe v. Emison*, 507 U. S. 25, 40-41 (1993). Therefore, Hispanic citizens wishing to challenge election systems, including districting plans developed as a result of the publication of the year 2000 census, will be obliged, in the Fifth Circuit, to first establish that it is possible to develop districts with majority Hispanic **citizen** voting age population. (App. 9a-10a). No other manner of proof to show that it is possible to draw a potential remedy district will suffice. *Id.* The districting process will likely begin, with most jurisdictions, upon the publication of the 2000 census in early 2001. Yet, citizenship data is not made available until after the redistricting process is completed. *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1409 (N.D. Ill. 1997), *aff'd in part, vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998). *See Johnson v. DeGrandy*, 512 U.S. 997, 1021 n. 18 (1994) (citizen voting age population not available at trial). Politically cohesive Hispanic citizens in the Fifth Circuit will therefore be foreclosed from any challenge under Section 2 of the Voting Rights Act of gerrymandered redistricting plans for several years while they await the publication of dated citizenship data, regardless of the size and concentration of the minority community.

Moreover, politically cohesive Hispanic citizens who may not be able to demonstrate, even after the publication of citizenship data, the ability to draw a majority Hispanic citizen

voting age population district, but who nevertheless can show that a viable electoral alternative exists (a district in which they actually have the potential to elect candidates of their choice) will be forever foreclosed from challenging even the most blatant racial gerrymandering in districting plans or discriminatory at-large election systems under Section 2. Numerous reasons may explain why a politically cohesive and geographically insular Hispanic community may not be able to draw a district with 50% or greater Hispanic citizen voting age population.

First, citizenship census data is based upon sample data, rather than the actual headcount used for redistricting. *Barnett*, 969 F. Supp. at 1409. Second, citizenship data is only available at the block group level rather than the block level upon which redistricting is based. *Id.* Third, the citizenship census data relied upon by the district court provides only a snap-shot view of citizenship levels in 1990, and thus does not take into account changes in citizenship levels since 1990 due to naturalization and the amnesty program of the Immigration and Naturalization Control Act of 1986. *King v. State Board of Elections*, 979 F. Supp. 582, 612-613 n. 58 (three judge court) (N. D. Ill., 1996), *aff'd.* __ U.S. __, 139 L.Ed.2d 866 (1998). Therefore, citizenship census data required by the Fifth Circuit to prove the *Gingles* factor is less reliable than the actual head count used for redistricting. *Id.*

The inability to draw a so-called majority Hispanic citizen voting age population district may, thus, have more to do with the unreliability of the data than with past and present reality. Yet, data generally useful in determining whether the Hispanic community possesses the potential to elect candidates from a putative district is useless under the Fifth Circuit's test. For example, as was done here, even if plaintiffs establish through the 1990 census data as well as through election data

that the submitted districts provide Hispanics with the potential to elect candidates of their choice, under the Fifth Circuit's rule such evidence cannot "remedy [plaintiffs'] failure to meet the *Gingles* threshold." *Perez v. Pasadena I.S.D.*, 165 F.3rd at 373. This standard, if generally followed, would allow jurisdictions to freely gerrymander cohesive Hispanic communities, and would leave Hispanic citizens in many at-large jurisdictions with no recourse under Section 2 of the Voting Rights Act.

Certiorari should be granted because the decision of the court of appeals has foreclosed an important cause of action under Section 2 of the Voting Rights Act to Hispanic citizens who will be left with no recourse to remedy even clearly gerrymandered districting plans and clearly discriminatory at-large election systems.

II. The Decision Below Conflicts with the Decisions of this Court and those of other Circuits.

The Fifth Circuit established a "bright-line" test that **only** by producing a single-member district with majority of Hispanic citizen voting age population may an Hispanic plaintiff establish the *Gingles I* threshold factor that a minority group be sufficiently large and geographically compact to form a majority in a single member district. (App. 8a-10a). This harsh holding conflicts with the rulings of this Court and is contrary to the decisions of other Circuits.

This Court first elaborated on the basic analytical framework established for evaluating a claim under Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Court provided some structure to the statute's "totality of circumstances" test in a case challenging North Carolina's legislative districts. *Gingles*, 478 U.S. at 47-51. The Court listed the factors outlined in the Senate Report concerning the

1982 amendments to the act and held:

> Under a "functional" view of the political process mandated by §2, . . . the most important Senate Report factors bearing on §2 challenges to multimember districts are "the extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political sub-division is racially polarized". . . If present, the other factors, . . . are supportive of, but *not essential* to, a minority voter's claim. *Gingles*, 478 U.S. at 48 n.15. (Citations omitted)

This Court also identified three threshold factors generally necessary to prove a Section 2 claim:

> Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. *Gingles*, 478 U.S. at 49.

This Court described a "geographically insular minority group" as a minority group that could comprise a majority in a single-member district. *Gingles*, 478 U.S. at 50. This Court reasoned that this factor was important to show that the minority group had the potential to elect candidates of their choice absent the challenged election structure. *Gingles*, 478 U.S. at 50 n.17. This Court has since recognized that the *Gingles* factors, including the geographically insular factor, should not be mechanically applied. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). The Court has also recognized that in some instances the geographic insularity factor would have to be modified to account for districts in which minority voters

could elect candidates of choice with the help of cross-over white voters in less than majority-minority districts. *Id.* In fact, this Court recognized that even the question of what benchmark data is appropriate for evaluating the *Gingles* threshold factor is unsettled. *Growe*, 507 U.S. at 38 n. 4. Even so, the Court recognized that in some communities, minority voters disadvantaged by at-large election systems may not need super-majorities in a single-member district in order to elect candidates of their choice. *Gingles*, 478 U.S. at 89 n.1 (O'Connor concurring in judgment); *Johnson v. DeGrandy*, 512 U.S. at 1006-1010 (1994). *See*, *Bush v. Vera*, 517 U.S. 952, 135 L.Ed.2d 248, 272 (1998) ("[T]he complexity of the districting process, [is] such that bright-line rules are not available.").

Clearly the new rule of the Fifth Circuit, establishing a mechanical, unbending "bright-line" test for evaluating the *Gingles I* threshold factor is inconsistent with the teachings of this Court that Section 2 claims be evaluated in a searching, functional, and comprehensive canvassing of the relevant facts.

The decision of the court of appeals is also contrary to the decisions of other federal courts. In *Sanchez v. State of Colorado*, 97 F.3rd 1303, 1311 (10th Cir. 1996), the court determined that the first *Gingles* factor required the plaintiff to show that a reasonable alternative exists to the challenged structure. In determining plaintiffs had met their burden under *Gingles I* by submitting a plan with just over 50% Hispanic voting age population, the court reasoned that "[b]ecause *Gingles* advances a functional evaluation of whether the minority population is large enough to form a district in the first instance, the Circuits have been flexible in assessing the showing made for this precondition." In *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990), the en banc court of the Eleventh Circuit determined that while voting age

population is one accurate measure of the potential for a minority group to elect their own candidates, a minority group that cannot establish that it is an absolute majority of a single member district may still bring an action under the Voting Rights Act so long as it can demonstrate that it has the potential to elect in its demonstration district. ("So long as the **potential exists that a minority group could elect its own representative** in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act.")(emphasis added). In *King v. State Board of Elections*, 979 F. Supp. 582, 612-613 n.58, the court specifically rejected the use of citizen voting age population as the **exclusive** measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor. In *Uno v. City of Holyoke*, 72 F.3rd 973, 985-86 (1st Cir. 1995), the court approved a finding that plaintiffs had met the *Gingles I* requirement by producing an Hispanic majority voting age population district and by showing that such district consistently elected Hispanic candidates. These federal courts have thus consistently examined the *Gingles I* requirement in a flexible and functional approach, in sharp contrast to the rigid approach employed by the Fifth Circuit.

The reasoning of the majority of the Circuits is consistent with this Court's instruction in *Gingles*. The importance of the geographic insular minority group issue is related to the ability of a plaintiff to show that the challenged structure is at the root of the discrimination by demonstrating that a reasonable alternative exists:

> Unless minority voters possess the **potential to elect** representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by the practice.

Gingles, 478 U.S. at 50-51 n.17 (emphasis added).

The focus has thus been on whether the minority group is concentrated enough to benefit from a geographical districting scheme, without restricting how that may be proven. *See, e.g., Solomon*, 899 F.2d. at 1018 n. 7 ("This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district. So long as the potential exists that a minority group could elect its own representative . . ."); *Sanchez*, 97 F.3rd. at 1314-1315 ("As we have noted, satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible. The evidence surely established the Hispanic population is 'sufficiently large,' the current district including 48.82% Hispanic population."). *See also* Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment," 34 Hastings L. J. p.58 (1982).

The Fifth Circuit's approach, on the other hand, overemphasizes and oversimplifies the point by focusing on the assumption that because only citizens have the right to vote, citizen voting age population should be used as the exclusive benchmark for evaluating whether a reasonable remedy is available. *Campos v. City of Houston*, 113 F. 3rd at 547 ("Only voting age persons who are United States citizens can vote"). Such an approach, while perhaps easier for a district court to administer, is inconsistent with *Gingles* and with the intent of Congress, as well as contrary to the rulings of other federal courts.

Certiorari should, therefore, be granted because the decision of the Fifth Circuit is contrary to the decisions of this Court and other federal courts, and to resolve the question of the appropriate measure for evaluating plaintiffs' *Gingles*

evidence.

III. The Decision of the Court of Appeals is Inconsistent with the Intent of Congress in the 1982 Amendments to the Voting Rights Act.

In amending Section 2 in 1982, one of Congress' primary concerns was the potential for vote dilution through the use of at-large elections. S. Rep. No.417, 97th Cong., 2d Session. 30 (1982)(Section 2 was designed to reach discriminatory "election system features such as at-large elections"). Moreover, Congress never intended that in evaluating the impact of an election structure "any particular number of factors be proved." S. Rep. No.417, at 29. In fact, Congress endorsed the approach applied by this Court in *White v. Regester*, 412 U.S. 755, 769-770 (1973), that the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality." *Id.* Congress, in amending Section 2, adopted a functional view of evaluating vote dilution rather than the formalistic approach adopted by the court of appeals. S. Rep. 417, at 30 n.120. This Court has recognized the Congressional intent that Section 2 evaluations should be guided by a comprehensive rather than mechanical and limited evaluation. *Johnson v. DeGrandy*, 512 U.S. at 1011 ("conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts").

The record here established that the plaintiffs submitted a reasonable alternative to the discriminatory at-large election system, *i.e.* districts that afforded Hispanics an opportunity to elect candidates of their choice. The plan submitted by the Hispanic citizens contained one district with majority Hispanic population, majority Hispanic voting age population and

majority Hispanic citizen voting age population based upon census data. (App. 3a). The unrefuted record demonstrates that single member districts from other jurisdictions in the geographic area adjacent to the putative district and with smaller Hispanic population concentrations had elected Hispanic candidates. (Tr. Vol.7, pp. 639-640). In spite of this record, the Fifth Circuit determined that because plaintiffs' putative district did not contain a majority Hispanic citizen voting age population according to admittedly inaccurate population projections of the Defendants, Plaintiffs had failed to meet their *Gingles* threshold obligation. (App. 11a). Such a mechanical approach to evaluating plaintiffs' Section 2 claim subverts the intent of Congress and, therefore, certiorari should be granted.

The Fifth Circuit's analysis under *Gingles* was based upon an improper legal standard that has foreclosed an important protection of the Voting Rights to Hispanic citizens, is inconsistent with the decisions of this Court and those of other circuit courts, and with the intent of Congress when it amended the Voting Rights Act in 1982.

IV. The Decision of the Court of Appeals Creates a New Standard for Replacement of Presumptively Valid Census Data.

The federal decennial census is presumed accurate until proven otherwise, and is therefore the most recent and accurate measure of population. *Latino Political Action Committee v. City of Boston*, 568 F.Supp. 1012, 1018 (D.C. Mass. 1983), *aff'd*, 784 F.2d 409 (1st Cir. 1986) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969)). Although populations change constantly and kinks in that data are common, *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), a "high degree of accuracy" of replacement data is required to supplant the

population figures of a prior decennial census. *Kirkpatrick v. Preisler*, 394 U.S. at 535. The standard to be applied is that decennial census figures will control unless there is "clear, cogent and convincing evidence" that both: 1) the current census figures are no longer valid, and 2) those population figures proposed for use are the best evidence of the current population. *Dixon v. Hassler*, 412 F.Supp. 1036, 1040 (W.D.Tenn.) (three judge panel), *aff'd sub nom., Republican Party v. Dixon*, 429 U.S. 934 (1976) (rejecting use of estimates prepared by a private corporation for the Bureau of the Census using population changes by census tract from the preceding decade, population density and land area of the tract, information from the preceding census about housing type, housing value, income and age of people and family structure, and listed telephones and registered automobiles for the tract).

When efforts are undertaken to adjust decennial population data, those efforts must be accomplished in a consistent, systematic process, not through an *ad hoc*, haphazard scheme. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

> Situations may arise where substantial population shifts over a period of time can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be throughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner.

Kirkpatrick v. Preisler, 394 U.S. at 535.

In 1990, ten years after the 1980 census, but a year

before release of the 1990 census data, the district court in *Garza v. Los Angeles County*, 756 F.Supp.1298 (C.D.Cal. 1990), supplanted census information with other population information (known as PEPS data) to analyze the effects of the redistricted election system for Los Angeles County on Hispanic voters and the potential for a remedial plan. *Id.* at 1321. The reliability of the *Garza* data used was thoroughly reviewed by the district court and described in its findings of fact and conclusions of law where the court characterized the data as a "unique and reliable source." F.Supp. at 1321. The court found the data was "all keyed back to the base line census point." *Id.* The data, which included both estimates and projections, had been developed over time. Four iterations had been produced for a five year period: in 1985, 1987, 1989 and 1990. *Id.* The data was based on information derived from the 1980 census, the California Department of Finance, and administrative and vital records. *Id.* Estimates were from observations of populations trends that occurred in the past according to administrative records and projections based on past and present trends and estimates of future situations. *Id.* Upon comparison to estimates from the Department of Finance and the Census Bureau, the court found the data "revealed high levels of consistency." *Id.* at 1322. The data was in use by governmental entities in Los Angeles County for planning functions, and was an independently verified source of reliable data. *Id.* at 1321. [2]

Moreover, the data relied on by the *Garza* court to

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[2] The Department of Health Services, the Department of Mental Health, the Sheriff's Department, the Superior Court system, the Municipal court system and the Public Library system, all branches of government in Los Angeles County, used the PEPS data for planning purposes for their official functions. *Id.*

supplant decennial census data was applied throughout the county and in a systematic, not *ad hoc*, manner. *Id.* at 1321-22. *See Kirkpatrick v. Preisler*, 394 U.S. at 535.[3]

This Court has required not only that the inaccuracy of the decennial census be demonstrated by clear and convincing evidence, but also that the replacement data be shown to be the best evidence of population and highly accurate. *Kirkpatrick v. Preisler*, 394 U.S. at 535. The data approved for use in this case to displace census data and defeat plaintiffs' voting rights claim was not only demonstrated to be **not accurate**, it was shown to be: 1) speculative data regarding projections for future population levels and 2) applicable only to a small area of the entire school district.

The Fifth Circuit's cavalier treatment of the standards established by this Court for substituting population information for census data wreaks havoc on historical standards applied to redistricting and threatens to "import a high degree of arbitrariness into the process." *Karcher v. Daggett*, 462 U.S. at 733. If allowed to stand, the new rule will affect not only this case, but will provide a completely new arena for redistricting litigation. It will generate continuous litigation at all levels of government throughout the decade, throwing political processes into constant turmoil and upheaval because of decisions or investments by and at the whim of

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[3] Only one other reported case approved supplanting decennial census data with alternative data. In *Meeks v. Avery*, 251 F.Supp. 245 (D.Kan. 1966), the court approved supplanting census data with population data derived from an enumeration accomplished annually in an actual head count that was conducted by deputy county assessors for the state of Kansas pursuant to state law.

developers. Basically, every new development or plan to develop could give cause for redistricting litigation.

In an effort to substantiate a clearly erroneous decision by the district court to allow substitution of population "information" designed to defeat the plaintiffs' challenge to an at-large election scheme for census data, the appellate court (and the district court) intoned precedential language to imbue a patina of scientific authority to what was a nakedly inadequate data set under all Supreme Court cases. The appellate court, and the district court below, threw out the window the repeated cautions from this Court that any readjustments of census data have to be consistent and accomplished or applied across the jurisdiction to be accepted as replacement data for decennial census information.

The district court and the appellate court below relied on the Fifth Circuit's *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d 1042 (5th Cir. 1990), for the proposition that wholesale replacement of census data for a jurisdiction with "non-census" data is permissible when "census data is not sufficiently probative . . . of a population."[4]

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[4] In *Westwego*, the population information that was missing was voting age data by race, data describing a characteristic of an existing population data set derived from the decennial census. *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d at 1045, n.3. The court allowed other information from governmental administrative records and unsuppressed census population information to be used to describe those characteristics. In this case, the district and appellate courts have approved the creation of a population data base with implied and unverifiable characteristics derived from unofficial sources, and its insertion into an aged population data base to create a crazy quilt of

(App.11a and 22a). The appellate court bolstered its position with its prior determination in *Perez v. Pasasdena Independent School District*, 165 F.2d at 371 affirming the district court's rejection of projections of growth in the Hispanic population that were based on past trends in the jurisdiction and compared to demonstrated school population growth over time during the current decade.[5] (App. 11a). The appellate court gave only a wink and a nod to this Court's firm holdings in *Karcher* and *Kirkpatrick*, characterizing that authority as "indirect," despite lifting language from those decisions to underpin the new standard it created. (App. 17a).

The Defendants' expert's report, which the lower courts accepted as "clear and convincing," froze the population all of the school district at 1990 levels, except the apartment complex

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population information about Alamo Heights I.S.D.

[5] The *Pasadena* court disapproved use of projections of citizen voting age population based on a prior twenty year trend of demographic changes, that had been applied throughout the school district, as part of the evidence demonstrating potential to create a majority Hispanic citizen voting age population district five years after the decennial census and satisfy the *Gingles I* criteria, and required plaintiffs to rely only on 1990 census data. *Perez v. Pasadena Independent School District*, 165 F.3d at 371. Plaintiffs' demographic expert had testified that the methodology was appropriate and likely under predicted actual growth rates. In this case, the Fifth Circuit has approved use of population projections (into the future) in a select area of a school district, with implied characteristics for those populations that have no foundation in census data and cannot be verified, to replace decennial census data in order to defeat minority plaintiffs' ability to meet the *Gingles I* criteria and voting rights claim.

inside and new housing immediately outside plaintiffs' putative district. (R. Vol.7, pp. 643, 645-650). The expert focused only on a remodeled existing apartment complex inside the district and new construction areas outside the district, in developing his substitute data set. Applying differing population rates in the complexes and projecting future, as yet non-existent, population for new construction areas he created a "base" population data set to adjust the 1990 census for the school district. (R. Vol.7, pp. 645-658; P-63). Further, he made assumptions based, not on tangible or reliable data, but on hypotheses and conjecture regarding both use of the housing units and population groups potentially inhabiting those housing units at some time in the future.[6] (R. Vol.7, p. 659). He treated the limited population trends he examined inside the putative district one way using one set of assumptions, and trends outside the putative district another way, resulting in the favorable end he sought to achieve. (R. Vol.7, pp. 670-671, 673-674, 685-687).

Then defendants' expert completely disregarded past demographic trends in the school district and immediately

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[6] Unable to establish a base line 1990 population for the apartment complex in the plaintiffs' putative district (known as The Oaks before remodeling and The Reserve after remodeling) defendant's expert made up numbers to fit his end, changing the number of residents allegedly living in the apartment complex when it closed in each of four separate reports on demographics in the school district produced in 1995, 1996 and April and August of 1997. (R. Vol.6, pp. 442, 567; R. Vol.7, pp. 647-650; P-63). The demographer also assumed, without basis, that all residents of the Oaks (most of whom were Hispanic) left plaintiffs' putative district and the school district when the apartment complex closed. He made no effort to verify that assumption. (R. Vol.7, pp. 656-658).

surrounding metropolitan areas which showed essentially growth of 28% in the Hispanic community and general decline in the school district's population overall (P-37), and testimony of the superintendent of the school district that there had been no decline in Hispanic student enrollment in the district. He studied no present or past census demographic information to assess what could be happening in 90% to 95% of the remainder of the populated area of the school district. He did not look at birth rates, death rates, in or out migration, changes in citizenship status or estimates of population undercounts or overcounts. (R. Vol.7, pp. 642-643, 710). He did not do so because he said it was not necessary when estimating population for small areas, basically when assessing population for two apartment complexes, allegedly housing between 5% and 10% of the school district's population, depending on which of the four reports he produced is relied on. (P-63).

The appellate court determined that the district court did not commit clear error when that lower court accepted the school district's April "1997" data as overcoming the 1990 census figures even though the report was the third of four separate and different "demographic" reports produced by the expert at different times, using different methodologies, relying on different assumptions and reaching different conclusions about "population changes" in the school district. (App. 11a-12a). Further, the April report had been abandoned by the school district in favor of the August 1997 report. (R. Vol.7, pp. 642-645, 654-655, 691). It **had not been offered** as evidence of best population information by the school district. Instead, a new report produced three months later, in August of 1997, which contained "more current data" and "corrected a calculation error" was the factual data upon which the trial was conducted. (App. 11a). However, the trial court rejected the August report in favor of the April report (App. 27a, 30a) despite the fact that both sides acknowledged the April report

was incorrect. The appellate court found there was no error because the bottom line was under either the August or April report, plaintiffs could not produce a majority Hispanic citizen voting age population district. (App. 11a).

The real danger of the appellate court's ruling is the arbitrariness introduced into redistricting litigation by acceptance of any data showing "change" to replace the decennial census while not requiring a showing of the validity of replacement data or adjustment of population anywhere but the focus "change" areas. The 1995 report of the district's expert had assumed a number for occupancy of The Reserve in 1990 and subtracted that population from the putative district. (R. Vol.7, p. 657). The occupancy number was increased in both the later April and then August 1997 reports by 10%. The August report more than doubled the "population growth" attributable to the select areas being analyzed by the expert, thus increasing the number of people required for an "ideal" district. (Compare: P-63 April Report at pg.12 to P-63 August report at pg.14). Defendants' expert admitted that the April report contained errors such as a 7% lower occupancy rate and average person per household for the "Hispanic" Reserve complex than actual rent rolls showed and calculated a lower average occupancy rate and average person per household for the Reserve than for the assumed "Anglo" housing units outside of the putative district. (R. Vol.7, pp. 654-655, 685-687). The April report allowed a 32% higher occupancy rate for Anglo housing units than actually existed because defendants' expert thought it should be that way. (R. Vol.7, pp. 670-674). The meter hook-up information relied on by the expert for his housing stock calculations just happened not to include new meter hook-ups in plaintiffs' putative district. (R. Vol.7, pp. 702-705).

After excluding a house to house survey conducted by

Plaintiffs in a neighborhood immediately adjacent to the putative district showing large increases in Hispanic population in that area[7], the court found plaintiffs were unable to introduce demographic studies contradicting the defendants' expert's report and determined that the April report "reflect[ed] the demographic realities of Alamo Heights." (App. 26a). The appellate court affirmed the district court, finding no clear error in its determination that the Rives' report "was clear and convincing in its demonstrated [sic] of sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district." (App. 12a). Going beyond its finding of no clear error, the appellate court approved the use of the "housing stock methodology" and its accompanying use of "municipal power company's records of new electrical hook-ups" and projections of future population as acceptable methodologies for calculating population information sufficient for wholesale replacement of decennial census information. (App. 12a). Neither court ever addressed the blatant omission by defendants' expert of what had happened to most of the population in the rest of the district over the course of the seven years since the decennial census, nor the effect of mixing the data from the decennial census with the non-census data for select areas and purposes only.

This case lacks the level of assurance provided in *Garza v. Los Angeles County*, one of two cases where census data has

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[7]An example of the fallacy of the defendants' expert's methodology is demonstrated in his affidavit in November, 1996 filed in response to Plaintiffs' Motion for Partial Summary Judgment. In it he asserted that no Hispanic majority blocks were adjacent to the putative district. (App. 5a). Plaintiffs' excluded, but proffered, survey evidence showed that in 1997, those blocks did exist south of the putative district. (App. 6a, 14a, 29a).

been replaced by other population information, that the replacement data approved had validity and was not arbitrary.[8] It was sufficient for both courts, however, that the data, regardless of its absence of accuracy, showed plaintiffs could not get over the hurdle of being unable to create a majority Hispanic voting age population under *Gingles*. In sharp contrast, both courts recognized that using decennial census, Plaintiffs met their *Gingles I* burden. "It is undisputed that using 1990 census data, it is feasible to draw a redistricting plan that satisfied the first *Gingles* requirement." (App. 3a, 24a).

As another decennial census approaches, certiorari should be granted to establish standards for determining when replacement of census data is appropriate and evaluating the data offered to supplant census information. Otherwise, the appellate decision in this case promises to cause significant chaos for plaintiffs and governments in redistricting for the foreseeable future.

CONCLUSION

The United States Supreme Court has stated that in a minority vote dilution case, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). Yet, the district and appellate courts in this case, without review or examination of two of the *Gingles* factors or the totality of circumstances, applied a "bright-line" test to Plaintiffs' evidence on the *Gingles I* threshold factor. Moreover, the

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[8] The appellate court's only assessment of the accuracy of the data was a belittling of plaintiffs' objections as "misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in Rives' methodology." (App. 11a).

Supreme Court has cautioned that only in very unusual circumstances should the census be discarded. *Kirkpatrick v. Preisler*, 394 U.S. at 534-535. Yet, the district court here accepted and the appellate court approved replacement data that was filled with error and based on haphazard methodologies in order to defeat the Plaintiffs' Voting Rights claim. The district court applied entirely new rules that are inconsistent or conflict with decisions of this Court and other Circuits. The appellate court's affirmation of the district court's new rules and dismissal of Plaintiffs' vote dilution claim because they failed to meet the *Gingles I* merits the grant of certiorari.

In seventy years of existence, Hispanic voters have never had a representative on Alamo Heights I.S.D. school board. Allowing this decision to stand perpetuates the deprivation of this most basic of fundamental rights in a representative democracy.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 98-50227

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT VALDESPINO; BRENDA ROLON,
Plaintiffs-Appellants,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT; ETHYL WAYNE, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; HARRY OREM, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; STEPHEN P. ALLISON, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; ANNE BALLANTYNE, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; THOMAS A. KINGMAN, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; TERRI MUSSELMAN, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; VICKI SUMMERS, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas,
Defendants-Appellees.

March 11, 1999, Decided

COUNSEL: For ROBERT VALDESPINO, BRENDA ROLON, Plaintiffs - Appellants: Mark Stanton Smith, Heard & Smith, Judith A Sanders-Castro, Les Mendelsohn & Associates, San Antonio, TX.

For ROBERT VALDESPINO, BRENDA ROLON, Plaintiffs - Appellants: Jose Garza, Edinburg, TX.

For ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, STEPHEN P ALLISON, ANNE BALLANTYNE, THOMAS A KINGMAN, Dr, TERRI MUSSELMAN, VICKI SUMMERS, ETHYL WAYNE, HARRY OREM, Defendants - Appellees: C Robert Heath, Amy Wellington Flinn, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, Austin, TX.

JUDGES: Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY: EDITH H. JONES

OPINION:

EDITH H. JONES, Circuit Judge:

The panel hereby withdraws its previous opinion and substitutes the following:

Plaintiffs-Appellants claim that the at-large, by-place, majority-vote elections for positions on the AHISD board of trustees dilute their votes as Hispanics in violation of Section 2 of the Voting Rights Act of 1965. See 42 U.S.C. § 1973 (1994) (as amended). The district court found that the Plaintiffs failed to make out a vote dilution claim because they could not prove, under the first Gingles threshold factor, that Hispanics are a "sufficiently large and geographically compact [group] to constitute a majority in a single-member district." Thornburg v. Gingles, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766, 92 L. Ed. 2d 25 (1986). All the issues on appeal involve proof of the first Gingles factor. In particular, we reject the appellants' contention that a "majority" may be less than 50% of the citizen voting-age population. As appellants' other contentions fare no better, the judgment is affirmed.

I.

The School District conceded at trial that the Plaintiffs' demonstration district n1 did comprise a majority of Hispanic voting-age citizens according to 1990 census data. The School District, however, presented evidence that demographic changes between the 1990 census and the 1997 trial had eliminated that majority. AHISD is a small district in which a few strategic land-use changes could and did significantly alter the district's population and neighborhood ethnic mix.

The School District's evidence was presented in expert testimony by Dr. Bill Rives, a demographer. Using the 1990 census data as a baseline, Rives investigated post-1990

changes in the school district's housing stock to determine how the population had changed in the Plaintiffs' demonstration district and in the school district at large. He testified that this methodology is "by far the most popular demographic estimation technique" and is especially appropriate for small areas.

Rives testified that two main trends combined to leave the Plaintiffs' demonstration single-member district "underpopulated" in 1997. Since 1990, the demonstration district had lost population (and the proportion of Hispanics in the demonstration district declined) because a large apartment complex had closed, been renovated, and reopened with a smaller number of residents. Simultaneously, the population of the school district at large had increased because of substantial new residential development in the Lincoln Heights area (formerly a quarry and cement plant), outside the demonstration district. As a result of these changes, the Plaintiffs' demonstration district no longer approached one-seventh of the school district's population, and thus could not be a proper single-member district.

To correct for the underpopulation, Rives added territory to the demonstration district. He added a contiguous area to the north that had been included in some of the appellants' prior proposed demonstration districts. That northern area ran clear to the edge of the school district and had just about the right number of people to make a proper district. Furthermore, if it were not added to the Plaintiffs' district, the northern area would have to be attached to a different district via a mile-long, narrow strip of unpopulated land. After the northern area was added to the demonstration district population, Hispanics made up only 47.9% of the voting-age citizen population of the revised demonstration district. Even

if the demonstration district were then partially depopulated (by 8.1% of the ideal population), this number would be 48.3%.

The general thrust of Rives's testimony had been clear for some time before trial. For example, in a November 1996 affidavit attached to the Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Rives had explained that no additions to the Plaintiffs' proposed demonstration district could sufficiently increase the Hispanic population because "there are no Hispanic-majority blocks that are adjacent to the proposed district." As the trial grew nearer, Rives updated his analysis, redoing calculations based on more recent data from the apartment complexes about the ethnicity of their residents. Ultimately, the district court relied on Rives's April 1997 Report.

Much of the controversy in the case comes from Rives's August 1997 Report. In July 1997, updated rental rolls became available from The Reserve, the large apartment complex within the Plaintiffs' demonstration district that had been renovated and reopened since the 1990 census. Rives then recalculated the results in his April 1997 report after learning that The Reserve had a slightly higher proportion of Hispanic residents than he had earlier believed. But he also corrected a calculation error in his April Report that had understated population growth in the school district at large. Nevertheless, he concluded that the revised data still did not yield a majority of Hispanics among voting-age citizens within the Plaintiffs' demonstration district. The August Report was given to the Plaintiffs in early August 1997, not long before the original trial setting. On August 22, however, the district court reset the trial for Monday, September 15.

The Plaintiffs' proffered expert witness, George Korbel, claims that he was surprised by the conclusions in Rives's August Report. In response, Korbel scrambled the week before the September trial date to conduct a door-to-door survey of the residents in a small area to the south of the demonstration district. He thought he could find there a high proportion of Hispanic residents that could increase their demonstration district's population without diluting its Hispanic majority. At 4:21 P.M. on Friday, September 12, the Plaintiffs faxed to the School District's counsel a letter disclosing the existence of this new survey. At 4:13 P.M. on Saturday, September 13, the Plaintiffs faxed the data from the survey.

On the Monday morning set for trial, September 15, the School District filed a motion to strike the survey on grounds of unfair surprise. The Plaintiffs' lawyer told the district court that their case in chief would rest entirely on 1990 census data, but that if Rives testified for the School District that more current data changed the Hispanic majority, then the Plaintiffs might use the recent survey as rebuttal testimony. The district court postponed until rebuttal any ruling on the motion to strike and granted a motion in limine to prevent mention of the survey during the case in chief or cross-examination. During the Plaintiffs' rebuttal, the School District renewed its objections to the survey evidence, and the district court granted the motion to strike. The Plaintiffs filed an offer of proof as to what their expert witness would have testified about the survey.

In its findings of fact and conclusions of law, the district court reiterated that Korbel's survey constituted unfair surprise and was excluded under Local Rule CV-16(e). To accommodate the Plaintiffs' objections to the lateness of

Rives's August Report, the district court decided to rely solely upon the April Report, which it found to be "thoroughly documented, [with] a high degree of accuracy," and "clear, cogent, and convincing enough to override the presumptive correctness of the prior decennial census." Relying on Rives's report, the district court found that the Plaintiffs had not proved a demonstration district with less than 10% population deviation that included more than 50% Hispanics among its voting-age citizens.

On appeal, the Plaintiffs present three arguments: that they were not required to meet a "bright line" test of 50% Hispanic voting-age citizens in their demonstration district; that the School District's evidence did not adequately overcome the presumed accuracy of the 1990 census data; and that the district court abused its discretion in excluding Korbel's proposed rebuttal testimony about the last-minute, door-to-door survey.

II.

This court reviews district court "findings on the Gingles threshold requirements for clear error." League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 847 (5th Cir. 1997). See also Gingles, 478 U.S. at 77-79, 106 S. Ct. at 2780-81. A district court's refusal to allow an expert to testify as a rebuttal witness may be overturned only for abuse of discretion. See Tramonte v. Fibreboard Corp., 947 F.2d 762, 764 (5th Cir. 1991); Bradley v. United States, 866 F.2d 120, 124 (5th Cir. 1989).

III.

The Supreme Court has established a three-part threshold inquiry when a racial or ethnic minority group asserts that its distinctive votes have been submerged by the racial majority in a multimember legislative district. The minority group must be able to (1) "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "show that it is politically cohesive," and (3) "demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances ... -- usually to defeat the minority's preferred candidate." Gingles, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

The Plaintiffs here argue that the district court erred in applying the first Gingles factor as a "bright line" requirement. The Plaintiffs advert to the general purpose of the Gingles factors, which is to provide a framework for showing that there could be "a single-member district in which they could elect candidates of their choice." This is intended to support the proposition that the Plaintiffs need only show generally their electoral potential. The Plaintiffs further argue that the Supreme Court has disavowed "mechanical[]" application of the Gingles factors. n2 And they complain that the district court did not evaluate evidence of vote dilution under the totality of the circumstances test.

All of these complaints are baseless. In reality, this court has interpreted the Gingles factors as a bright line test. Each factor must be proved before it is necessary to proceed to the totality of the circumstances test. We have repeatedly disposed of vote dilution cases on the principle that "failure to establish any one of these threshold requirements is fatal." Campos v. City of Houston, 113 F.3d 544, 547 (5th Cir. 1997); accord Rangel v. Morales, 8 F.3d 242, 249 (5th Cir. 1993); Overton v. City of Austin, 871 F.2d 529, 538 (5th Cir.

1989). See also Growe v. Emison, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388 (1993) ("Unless [the three Gingles factors] are established, there neither has been a wrong nor can be a remedy.").

Furthermore, contrary to the Plaintiffs' suggestion, this court has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district. In Gingles, the Supreme Court required plaintiffs to demonstrate "a majority." 478 U.S. at 50, 106 S. Ct. at 2766. Both of the Fifth Circuit cases cited by the Plaintiffs assumed that 50% was the threshold for "majority" and simply addressed what evidence could be used to prove that the 50% threshold was met. In Brewer v. Ham, the court acknowledged that a super-majority of black residents could be used to prove that blacks constituted a majority of voting-age residents. See 876 F.2d 448, 452 (5th Cir. 1989) (citing cases with raw super-majorities of 65.9%, 71.5%, and higher). In Westwego II, this court repeated Brewer's holding and expanded on it in a footnote. The footnote, much cited by the Plaintiffs, explained that those plaintiffs "unable to produce hard data" on voting-age population because of the way census data are collected and reported would be able to submit "other probative evidence" to prove voting-age population. See Westwego Citizens for Better Gov't v. City of Westwego, 906 F.2d 1042, 1045 n.3 (5th Cir. 1990). In context, Westwego II's statements did not alter what must be proved, only what can be used to prove it. The Plaintiffs still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district.

Finally, this court has already determined what factors limit the relevant population in the district: voting-age and

citizenship. This was made clear in Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997) (courts "must consider the citizen voting-age population" in evaluating the first Gingles factor). See also Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368, 372 (5th Cir. 1999). Given that the Supreme Court has avoided the issue of what population to use for the first Gingles factor, n3 and that other circuits have used the same approach as Campos, n4 the district court used the correct legal test here.

IV.

In this case, evaluating the district court's application of that test involves two questions: whether the School Board's evidence was adequate to counter the Plaintiffs' census data, and whether the district court abused its discretion in excluding the Plaintiffs' proposed rebuttal evidence.

A.

Except for a cavil, the parties and the district court essentially agree about what standard should be required to overcome census data. n5 As the district court summarized it:

> Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census.

This standard appears to be an elaboration on one used by the Seventh Circuit. See McNeil v. Springfield Park Dist., 851 F.2d 937, 946 (7th Cir. 1988). Two Fifth Circuit cases are

relevant. n6 The first is Westwego II, which, as mentioned above, opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population. See Westwego, 906 F.2d at 1045 n. 3. The second is Perez, in which this court affirmed a district court's decision that the plaintiffs' population projections were too unreliable to overcome 1990 census data. See Perez, 165 F.3d at 373. Based on Westwego and Perez, the district court properly acknowledged the persuasiveness of census data while admitting evidence that demonstrated its inaccuracy in this case. Because the district court found that the School Board's 1997 population data overcame the 1990 census figures, the question is whether that finding was clearly erroneous.

The Plaintiffs present a laundry list of purported problems concerning the methodology of Rives, the School Board's demographics expert. The School Board's responses as well as Rives's cross-examination at trial suffice to show that the Plaintiffs' challenges are generally misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in Rives's methodology, or based on the analysis in Rives's superseded 1995 reports. The Plaintiffs' most emphatic argument -- that Rives himself admitted his April Report was "wrong" -- is overstated, because Rives did so only in the context of explaining how the August Report was based on more current data and corrected a calculation error. Rives's admissions did not affect the underlying finding of both the April and August Reports: the Plaintiffs' demonstration district did not contain a majority of Hispanic voting-age citizens.

The general description of Rives's methodology given above reveals that the Gingles I issues in this case do not involve

any complicated statistical formulae or tests of significance that might bedazzle or bamboozle an unwary district court. Cf. Overton v. City of Austin, 871 F.2d 529, 544-45 (5th Cir. 1989) (Jones, J., concurring) (discussing some district courts' ill-founded assumptions about the levels at which correlation coefficients become statistically significant). The data here were relatively simple; their manipulation involved only rudimentary arithmetic.

Under these circumstances, the district court did not clearly err in deciding that Rives's report demonstrated sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district. In doing so, we take special note of the School Board's responses to the Plaintiffs' three weightiest methodological criticisms, each of which the district court could have credited without committing clear error: (1) the housing stock methodology can be appropriate for calculating population changes in small areas, (2) it was appropriate to account for some apartment complexes by projecting their imminent populations at the end of ongoing lease-up periods, and (3) despite some lapses, the municipal power company's records of new electrical hook-ups were an accurate gauge of newly developed housing in the entire school district. Further, the School Board's methodology was much more sophisticated than the crude straight-line population projection that was rejected in Perez. See Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196, 1212-13 (S.D. Tex. 1997), aff'd, 165 F.3d at 373 (5th Cir. 1999).

B.

Even if the district court properly credited the School Board's post-census demographic evidence, the Plaintiffs argue that it

abused its discretion by excluding their proposed rebuttal evidence about post-census populations.

The district court excluded any evidence from Korbel's last-minute survey "because it unfairly surprised the Defendants," citing W.D. TEX. R. CV-16(e), under which the district court may, "upon the showing of good cause," permit a party to supplement the written summary of an expert's proposed testimony. n7

On appeal, the Plaintiffs offer two reasons why their evidence was not an unfair surprise: (1) Korbel had testified in his deposition that Hispanic population was available south of the demonstration district; and (2) the survey was done in response to "new methodologies and numbers" in Rives's August Report and was made available as soon as it was completed.

The Plaintiffs' first reason fails to account for how modern discovery handles expert witnesses. The Local Rule required a "written summary of [Korbel's] proposed testimony." It further required that summary to include "the basis of the opinions which purport to be the testimony of the witness" and "specific references to any exhibits that will be used by the witness in support of any opinions." W.D. TEX. R. CV-16(e) & note. It can scarcely be maintained that Korbel's cursory reference in a deposition could serve as adequate notice of his intent to rely on a door-to-door survey of a specific neighborhood. Nor could that deposition response have provided sufficient information for the School Board to prepare to cross-examine Korbel about the survey. Cf. Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996)

(initial expert disclosures not sufficiently "complete and detailed" to meet discovery order).

The Plaintiffs' second reason takes no account of the fact that the district court relied only upon Rives's April Report, the admissibility of which the Plaintiffs never contested. If the survey was made necessary only by the novelty of the August Report, then apparently it could not have been detrimental to the Plaintiffs to exclude both.

In sum, the court did not abuse its discretion by excluding this evidence for unfair surprise when the proffering party failed to meet its duty to supplement its expert disclosures. See Alldread v City of Grenada, 988 F.2d 1425, 1436 (5th Cir. 1993) (no error in excluding expert witness' testimony when information crucial to understanding it was not provided until two weeks prior to trial); Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989) (proper use of discretion to exclude results from tests conducted by plaintiffs' expert the week before trial). n8

Because it was not an abuse of discretion to exclude the survey results on the grounds of unfair surprise, we need not address whether Korbel's survey would have constituted proper rebuttal testimony.

V.

For the foregoing reasons, the district court properly placed the burden on the Plaintiffs to prove a majority of Hispanics among voting-age citizens in their demonstration district; the district court did not clearly err in finding the School Board presented sufficient evidence to prove demographic changes since the census; and the district court did not abuse its

discretion in excluding the Plaintiffs' proposed rebuttal testimony for unfair surprise.

The judgment of the district court is AFFIRMED.

----------Footnotes----------

n1 The "demonstration district" is the hypothetical single-member district used by voting rights plaintiffs to demonstrate that they can satisfy the first Gingles factor (i.e., that their group could constitute a majority in a single-member district). Because the AHISD Board of Trustees has seven members, the Plaintiffs must propose a demonstration district that would be appropriate if the at-large district were divided into seven single-member districts.

n2 In Voinovich v. Quilter, the Supreme Court did say, "the Gingles factors cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. 146, 158, 113 S. Ct. 1149, 1157, 122 L. Ed. 2d 500 (1993). The Court did so, however, because it was adapting the Gingles test, which was designed for challenges to multimember districts, so that it could be used for challenges to the packing of minority voters into existing single-member districts. Because that changed context is not relevant to this case, which challenges a multimember district, plaintiffs have no need to invoke non-mechanical application of the Gingles factors.

n3 See Johnson v. De Grandy, 512 U.S. 997, 1008-09, 114 S. Ct. 2647, 2656-57, 129 L. Ed. 2d 775 (1994); Growe v.

Emison, 507 U.S. 25, 38 n.4, 113 S. Ct. 1075, 1083 n.4, 122 L. Ed. 2d 388 (1993).

n4 See Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997) (using citizen voting-age population for first Gingles factor); Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) (same), overruled in part on other grounds by Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990). Cf. Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Posner, C.J.) (using citizen voting-age population to determine proportionality for Section 2 challenge to gerrymandering of single-member districts), cert. denied sub nom. Bialczak v. Barnett, 141 L. Ed. 2d 740, 118 S. Ct. 2372 (1998).

n5 The cavil is that Plaintiffs attempt to articulate a two-step test: "The decennial census is controlling unless there exists 'clear, cogent and convincing evidence' that the decennial figures are no longer valid and that other figures are valid." For this proposition, however, they cite only Garza v. County of Los Angeles, 756 F. Supp. 1298, 1345 (C.D. Cal. 1990). In fact, the Garza court specifically rejected the notion of a two-step test:

> 17. In order to overcome the presumption in favor of the 1980 census data, plaintiffs need not demonstrate that the census was inaccurate.
>
> 18. It is sufficient to conclude that there has been significant demographic changes [sic] since the decennial census and that there exist[] post-decennial population data that

> more accurately reflect[] evidence of the current demographic conditions.

Id.

n6 The only Supreme Court authority on this matter is indirect. See Karcher v. Daggett, 462 U.S. 725, 732 n.4, 103 S. Ct. 2653, 2659 n.4, 77 L. Ed. 2d 133 (1983) (in reapportionment, a state cannot "correct" census figures "in a haphazard, inconsistent, or conjectural manner"); Kirkpatrick v. Preisler, 394 U.S. 526, 535, 89 S. Ct. 1225, 1231, 22 L. Ed. 2d 519 (1969) (a state can consider post-census population shifts in redistricting if its findings are "thoroughly documented and applied throughout the state in a systematic, not an ad hoc, manner"). The Ninth Circuit refused to apply the Seventh Circuit's "high standard" of "clear and convincing" evidence "in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy." Garza v. County of Los Angeles, 918 F.2d 763, 773 n. 3 (9th Cir. 1990).

n7 Alternatively, in a footnote, the district court noted that the methodology and execution of Korbel's survey were too flawed for the results to overcome the presumptive correctness of the 1990 census. Although it appears quite compelling, the School Board does not press this line of argument, and we need not pursue it since we hold that the evidence was properly excluded due to unfair surprise.

n8 The survey evidence was also unnecessary once the district court excluded the District's August Report. This satisfies the first factor of a four-factor test that has sometimes been applied in evaluating a district court's exercise of discretion: "(1) the importance of the witness's

testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness." Bradley v. United States, 866 F.2d 120, 125 (5th Cir. 1989). See also Sierra Club, 73 F.3d at 572 (using same four factors in evaluating exclusion of evidence as sanction for violating discovery order). The Plaintiffs would also appear to fare quite poorly on the fourth factor, since it was obvious from the beginning that the School District would present evidence of 1997 population. Neither party addresses the four-factor test on appeal, though the School District discussed it in its original motion to strike.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT VALDESPINO and
BRENDA ROLON,
Plaintiffs,

v.

ALAMO HEIGHTS INDEPENDENT
SCHOOL DISTRICT, et al.,

Defendants.

Civil Action No. SA-95-CA-0817

ORDER

Pursuant to Federal Rule of Civil Procedure 52(a), the Court hereby enters its findings of fact and conclusions of law after trial before the Court.

The Plaintiffs in the present case challenge the at-large voting system for electing members of the school board for the Alamo Heights Independent School District (the "AHISD"). Plaintiffs contend that the current system dilutes the votes of politically cohesive Hispanics in the AHISD, in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq. and the Fourteenth and Fifteenth Amendments to the United States Constitution. After trial on the merits

from September 15 through September 19, 1997, the Court enters the following memorandum decision and order.

Discussion

"Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, ... district courts [must] explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning)." Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1203 (5th Cir.1989); quoting Velasquez v. City of Abilene, 725 F.2d 1017, 1020 (5th Cir.1984). The Fifth Circuit has emphasized that there is a "special need for detailed findings of fact in vote dilution cases." Westwego Citizens for Better Gov't v. Westwego, 872 F2d 1201, 1203 (5th Cir.1989); see also Overton v. City of Austin, 871 F.2d 529, 530-31 (5th Cir.1989) (the district court must perform a "searching and practical evaluation of 'past and present reality'"). In accordance with the requirements of Fed. R. Civ. P. 52(a) and the Fifth Circuit precedents, this court examines the applicable law and sets out its Findings of Fact and Conclusions of Law.

The fundamental question in this section 2 vote dilution case is whether, as a result of the at-large system for the AHISD school board elections, Hispanics in the AHISD "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." Thornberg v. Gingles, 478 U.S. 30, 44-45, 106 S. Ct. 2752, 2763, 92 L.Ed. 2d 25 (1986). In Gingles, the Supreme Court held that the use of at-large voting would not impede "the ability of minority voters to elect representatives of their choice" unless there is a white bloc voting majority that would "usually be able to defeat candidates supported by a politically cohesive,

geographically insular minority group." 478 U.S. at 47-48, 106 S.Ct. at 2765. In order to show that they cannot elect representatives of their choice, plaintiffs in a section 2 case must meet the Gingles three-part threshold test:

> [f]irst that the group is sufficiently large and geographically compact to constitute a majority in a single member district; second, that it is politically cohesive and third, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

Growe v. Emison, 507 U.S. 25, 39-41, 113 S. Ct. 1075, 1084, 122 L.Ed.2d 388 (1993); see also Gingles, 478 U.S. at 49-53, 106 S.Ct. at 2766-67; Clark v. Calhoun County, Miss., 88 F.3d 1393, 1395 (5th Cir. 1996).

With regard to the first Gingles factor, it is the burden of the Plaintiffs to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens, and such that the sum of the deviation of the largest district from ideal and the smallest district from the ideal is less than ten percent. fn1. The majority of courts addressing this issue have held that a plaintiff must establish that it is possible to create a district with a majority of minority voting-age citizens. Campos v. Harris County, 113 F.3d 544, 547-48 (5th Cir. 1997); McNeil v. Springfield Park District, 851 F.2d 937, 944-45 (7th Cir.1988), cert denied 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); Dickinson v. Indiana State Election Board, 933 F.2d 497, 503 (7th Cir.1991) ("a simple majority of eligible voters in the single-member district"); Romero v. City of Pomona, 665 F.Supp. 853, 854 (C.D.Cal.1987), aff'd, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (stating that Gingles refers to effective voting majorities, rather than raw population totals, as

the touchstone for determining geographical compactness). See also Perez v. Pasadena Independent Sch. Dist., 958 F. Supp. 1196, 1210 (S.D.Tex. 1997) citing Garza v. County of Los Angeles, 918 F. 2d, 763, 785 (9th Cir. 1990) (Kozinski, J., concurring in part, dissenting in part), cert. denied, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991) citing Brown v. Thomson, 462 U.S. 835, 838-39, 103 S.Ct. 2690, 2694, 77 L.Ed.2d 214 (1983) (discussing 10% rule).

In deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy the first prong of Gingles, a court is not confined to United States census data. Kirkpatrick v. Preisler, 394 U.S. 526, 534-36, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519 (1969); Garza, 918 F.2d at 772-73; Dixon v. Hassler, 412 F.Supp. 1036, 1040 (W.D.Tenn.) aff'd, 429 US. 934, 97 S.Ct 346, 50 L.Ed2d 303 (1976); see also Westwego Citizens for Better Gov't v. City of Westwego, 906 F.2d 1042, 1045-46 n. 3 (5th Cir. 1990). Nevertheless, census figures are presumed accurate until proven otherwise. McNeil, 851 F.2d at 946. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct at 1231; Dixon, 412 F. Supp. at 1040; Graves v. Barnes, 446 F. Supp. 560, 568 (W.D.Tex. 1977), aff'd, 435 U.S. 901, 98 S.Ct. 1444, 55 L.Ed.2d 492 (1978). Federal census data must be used unless there is more reliable data. McNeil, 851 F.2d at 946; Skorepa, 723 F.Supp. at 1390. "Estimates based on past trends are generally not sufficient to override 'hard' decennial census data." McNeil, 851 F.2d at 946.

If the Gingles three-part threshold is met, Plaintiffs must then also show that under the "totality of the circumstances," Plaintiffs do not possess the same

opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters. Rollins v. Fort Bend Independent School District, 89 F.3d 1205 (5th Cir. 1996); Clark, 88 F.3d at 1396 ("it will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of the circumstances"); LULAC v. Clements, 999 F.2d 831, 849 (5th Cir.1993) (en banc), cert. denied, 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994). To make this determination, a court must conduct a "searching practical evaluation" of the factors set forth in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir.1973) (en banc), aff'd sub. nom., East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and in the Senate Report of the 1982 Amendments to the Act. If the Plaintiffs can meet this "totality of the circumstances" test, and can successfully establish the three Gingles preconditions, then they are entitled to prevail.

The Plaintiffs have presented the Court with three proposed plans for redistricting: Plan J-552, Plan J-696, and Plan J-557. The first two of these plans utilize the same exact district; the third of these plans contains all of the district contained in the first two plans, plus a small extension northward (the "northward expansion").fn2

The Plaintiffs introduced evidence that 85.36% of voting-age Hispanics in San Antonio are citizens eligible to vote. See Plaintiffs' Exhibit 1-a. The Plaintiffs also introduced evidence that 89% of the voting-age Hispanics are eligible to vote, and it appears that the Defendants used that number in their calculations.

Findings of Fact

1. 89% of the voting-age Hispanics are citizens eligible to vote.

2. According to the 1990 census figures, there were 3,541 persons in the district proposed by Plan J-552 and Plan J-696. The district contained 2,217 persons identified as Hispanic, and of this group, 1,424 were of voting age, and 1,267 were citizens eligible to vote. The proposed district contained 1,029 non-Hispanic citizens of voting age. See Plaintiffs' Exhibits "1-a," "1-e," and "63."

3. According to the 1990 census figures, the population of the district proposed by Plan J-557 contained 3,667 persons; of these, it appears that 2,184 were of Hispanic origin, 1,474 were Hispanic of voting age, and the Court calculates that 1.312 were Hispanic citizens of voting age. The proposed district also contained approximately 2,557 voters, so Hispanics accounted for approximately 51.3 percent of the voters in this district.fn3

4. It is undisputed that using the 1990 census data, it is feasible to draw a redistricting plan that satisfied the first Gingles requirement. See Plaintiffs' Exhibits 1-a - 1-c.

5. The Defendants' expert on demography, Dr. Bill Rives, extensively analyzed the population trends in the AHISD and produced a report in April of 1997.fn4

6. In the April Report, Dr. Rives found that the overall population of Alamo Heights had experienced a gain of approximately 1,648 people (making the overall population 27,457 persons, and the ideal district 3,922 persons), but that the districts proposed in plans J-552 and J-696 had experienced a net loss of 128 persons.fn5

7. In the April Report, Dr. Rives also found that the Hispanic citizen voting age population for the proposed districts had declined by approximately 59 people, and that the non-Hispanic citizen voting age population had increased in these districts by 151 people.

8. The April Report does not directly address Plan J-557, except to note that there was no post-census gain in the northward expansion area. The April Report does, however, state that expanding the district proposed in plans J-552 and J-696 will destroy the Hispanic majority enjoyed by the district, and thus indirectly addresses the likely effect of the "northward expansion" contemplated in Plan J-557.

9. The April Report is thoroughly documented, has a high degree of accuracy, and is clear, cogent, and convincing enough to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct. at 1231; Dixon, 412 F.Supp. at 1040; Graves v. Barnes 446 F.Supp. 560, 568 (W.D.Tex.1977), aff'd, 435 U.S. 901, 98 S. Ct. 1444, 55 L.Ed.2d 492 (1978).

10. Using the April Report's figures, the districts proposed by Plans J-552 and J-696 have suffered a net loss of 128 persons, leaving these districts with an overall population size of 3,413 people. This number deviates from the ideal district by 509 people, or 12.9%.

11. Using the April Report's numbers, the district proposed by Plan J-557 has similarly suffered a loss of 128 persons, leaving this district with an overall population of 3,539. This number deviates from the ideal by 383 people, or 9.7%.

12. Using the April report's numbers, the district proposed by Plan J-557 has lost approximately 59 Hispanic voters, but the non-Hispanic voting population has increased by 151 voters.fn6 In terms of raw numbers, this means that the district proposed by Plan J-557 contained 1,253 Hispanic voters out of a total of 2,607 voters --or, in other words, Hispanics constitute only 48% of the voting population.fn7

13. The April Report's numbers reflect the demographic reality of Alamo Heights.

14. The Plaintiffs were not able to introduce any demographic studies to contradict the report of Dr. Rives. However, the Plaintiffs did attempt to introduce a demographic study that Mr. George Korbel, the Plaintiffs' expert, completed two days before trial, but the Court refused to allow this study to come in because it unfairly surprised the Defendants. fn8 See Local Rule CV-16(e) ("Supplementation, regarding substance and

timeliness, may be permitted by the Court upon a showing of good cause.")

15. The Court makes no findings with regard to the other Gingles factors or Zimmer factors, because the Plaintiffs cannot satisfy the first of the Gingles requirements.

16. Any findings of fact above should be construed as conclusions of law to the extent necessary.

Conclusions of Law

1. It is the burden of the Plaintiffs to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens, and such that the sum of the deviation of the largest district from ideal and the smallest district from the ideal is less than 10 percent.

2. A court is not confined to United States census data in deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy the first prong of Gingles. Nevertheless, census figures are presumed accurate until proven otherwise. McNeil, 851 F.2d at 946. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census.

3. Because the Court has found that the April Report of Dr. Rives is thoroughly documented, has a high

degree of accuracy, and is clear, cogent, and convincing, the Court will accept the adjustments made by the April Report to the 1990 Census figures.

4. The district proposed by Plan J-552 and J-696 contains insufficient population to satisfy the first Gingles requirement.

5. The district proposed by Plan J-557 does not contain a majority of Hispanics among its citizen-age voting population, and therefore, does not satisfy the first Gingles requirement.

6. The Plaintiffs have not established by a preponderance of the evidence that they can draw a district that satisfies the first requirement of Gingles, and therefore, their claim under Section 2 of the Voting Rights Act must fail.

7. There is insufficient evidence of intentional discrimination against minorities in the AHISD school board elections. Therefore, on the present record, the Court does not find discriminatory intent in violation of the Fourteenth or Fifteenth Amendments to the United States Constitution.

8. Any conclusions of law above should be construed as findings of fact to the extent necessary.

CONCLUSION

Plaintiffs' theory of this case is that the current at-large election system and white bloc voting prevent minority candidates from being elected to the board of

trustees of the AHISD. Plaintiffs have not proven that it is possible to create a single-member district in which the majority of voting-age citizens are Hispanic. Because Plaintiffs have not met the "necessary preconditions[]" set out in Gingles, 478 U.S. at 49-51, 106 S.Ct. at 2766, this court must find in favor of Defendants.

Accordingly, it is hereby ORDERED that all of the Plaintiffs' claims for relief are DENIED, and that the JUDGMENT be entered for the Defendants and against the Plaintiffs. It is further ORDERED that all motions in the present case are DENIED as MOOT.

SIGNED and ENTERED this 3rd of February 1998.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

Footnotes

fn1An ideal district is determined by dividing the overall population by the number of districts to be created. Thus, in a city with 90,000 people and nine districts, an ideal district would contain 10,000 people.

fn2The Plaintiffs also presented this Court with two other plans-- J-551 and J-559. Both of these plans offer districts that are even smaller than the ones offered by the other proposals. For the reasons described herein, neither of these plans will satisfy the Gingles requirements, and therefore the Court will not make detailed findings of fact with regard to

J-551 or J-559. The Plaintiffs at trial also made a proffer with regard to a "southern expansion." For the reasons described below, the Court will not consider this additional plan.

fn3This number was derived from the percentages of citizens per ethnic group, given in Plaintiffs' Ex. 1-a, and the population breakdown of the proposed district, given in Plaintiffs' Ex. 1-c. Thus, of the 103 African Americans living in the district in 1990, approximately 102 were citzens; similarly, of the 30 people of "other" ethnic background, 24 were citizens. Adding 1,312, 102, 30, and 1,119 (the number of Anglo voters), the Court reaches the 2,557 value.

fn4Dr. Rives also produced a report in August of 1997 (the "August Report.") In that Report, Dr. Rives found that the overall population of the district proposed by Plan J-552 and J-696 has lost 140 people, while the overall population of Alamo Heights has increased by 3,133 people. Dr. Rives also found that the Hispanic voting age population has declined by 48 people, and that the non-Hispanic voting age population has risen by 113 people. The August Report does not directly address Plan J-557, except to note that there was no post-census gain in the northward expansion area. The August Report does, however, state that expanding the district proposed in plans J-552 and J-696 will destroy the Hispanic majority enjoyed by the district, and thus indirectly addresses the likely effect of the "northward expansion" contemplated in Plan J-557. The Plaintiffs complain that the August Report was delivered so late that the Plaintiffs did not have time to prepare a valid defense against it. See, Transcript, September 15, 1997 at approx 9:36 a.m. To take the approach most favorable to the Plaintiffs, the Court therefore will only consider the analysis contained in Dr. Rives's April Report. See Local Rule CV-16.

fn5 This loss in population was found, in large part, to be caused by the renovation of a large apartment complex contained in the area. The complex originally had 643 residents; it reopened with only 329 residents, and the proposed districts gained 186 residents from post-census growth. On cross examination, Dr Rives admitted that, using a different methodology, he had originally computed the apartment complex to have only 591 residents; however, Dr. Rives testified credibly as to his reasons for abandoning that methodology. See also Defendant's Response to Plaintiffs' Motion for Summary Judgment, filed November 25, 1996, at 2, n.1.

fn6 As the Court noted previously, no party has given the Court any information with regard to the ethnic make-up of the northward expansion zone of Plan J-557. As a result, the Court simply declines to speculate as to what the racial mix is of the families contained in the expansion zone.

fn7It is interesting to note in passing that Dr. Rives's reports predicted that expanding to the north would upset the fragile Hispanic voter majority, but Dr. Rives never explicitly considered Plan J-557. Obviously, Dr. Rives's testimony is bolstered by the fact that his predictions seemingly have proven accurate.

fn8 Moreover, the Court also would need to exclude the proffered evidence on grounds that it is neither "thoroughly documented," nor does it have a high degree of accuracy, nor is it "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct. at 1231; Dixon, 412 F.Supp. at 1040; Graves v Barnes, 446 F.Supp. 560, 568 (W.D.Tex.1977). aff'd, 435 U.S. 901,

98 S.Ct. 1444, 55 L.Ed.2d 492 (1978). Mr. Korbel himself admits in his proffer that the methodology of his survey required that all homes be visited at least twice before neighbor attribution was attempted, and that he did not follow that methodology (Affidavit of Mr. Korbel at 4.). Mr. Korbel also admits that usually a survey of this type takes several weeks to develop, survey, return, verify, and analyze, but that this process was "truncated." In short, even if there were no undue surprise, the Court would not accept these survey results.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT VALDESPINO and
BRENDA ROLON,
Plaintiffs,

v.

ALAMO HEIGHTS INDEPENDENT
SCHOOL DISTRICT, et al.,
Defendants.

Civil Action No. SA-95-CA-0817

JUDGMENT

In accordance with the Order entered by this Court on this same date, it is hereby ORDERED, ADJUDGED AND DECREED that JUDGMENT is GRANTED against the Plaintiffs and in favor of the Defendant.

It is further ORDERED, ADJUDGED AND DECREED that all pending motions in this case are DENIED AS MOOT

SIGNED and ENTERED this 3rd day of February 1998.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

ENFORCEMENT OF VOTING RIGHTS

(Section Two of the Voting Rights Act)

42 U.S.C. Sec. 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.